1-1-1974

The Land Use Planning Act – An Idea We Can Do Without

John McClaughry

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr
Part of the Land Use Law Commons

Recommended Citation
John McClaughry, The Land Use Planning Act – An Idea We Can Do Without, 3 B.C. Envir. L. Rev. 595 (1974),
http://lawdigitalcommons.bc.edu/ealr/vol3/iss4/2

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
THE LAND USE PLANNING ACT—AN IDEA WE CAN DO WITHOUT

By John McClaughry*

On June 11, 1974 the House of Representatives, by a paper thin 211-204 vote, refused to adopt a rule to permit consideration of the Land Use Planning Act (LUPA) of 1974. The vote was the signal for an outpouring of lamentation from leading national newspapers and the more ardent sponsors of land use legislation. Congressman Morris Udall (D-Ariz.) vowed to carry the fight to the 94th Congress, and the measure will undoubtedly be one of the most controversial to come before that assembly.

The major features of the bill itself have been adequately and enthusiastically described in this journal. The purpose of this article is fourfold: to present a highly condensed critique of the main thrust of the bill, without dissecting it section by section; to explore the workings of a “comprehensive land use planning process” in practice, as illustrated by the Vermont experience; to describe a number of alternative approaches to land use guidance that avoid the use of the police power (either altogether, or without appropriate compensation to land-owners); and to suggest the outlines of a Federal approach to the question that would eliminate the most disturbing features of the LUPA.

I. NATIONAL LAND USE PLANNING LEGISLATION

After three years of tentative beginnings and false starts, the Senate in 1973 passed and sent to the House a major “Land Use Planning and Policy Assistance Act”, S. 268, sponsored by Senator Henry Jackson (D-Washington). On September 13, 1973, Representative Morris K. Udall (D-Arizona) and 14 co-sponsors introduced a very similar companion measure, H.R. 10294. This bill was reported by a 26-11 vote of the House Interior and Insular Affairs Committee on February 13, 1974.

Much to the consternation of the bill’s backers, the House Rules Committee on February 26 voted 9-4 to postpone indefinitely a rule.
for debate of the measure. To mollify critics who opposed consideration of the bill on the grounds that no public hearings had ever been held on it, the Interior and Insular Affairs Committee's Subcommittee on the Environment, chaired by Representative Udall, held three days of hearings in Washington on April 23, 24, and 26. Despite the fact that the overwhelming majority of witnesses testifying at those hearings urged rejection of the bill, or at the very least a prolonged round of field hearings across the country, not one word of the bill was changed.

After considerable backstage maneuvering, the Rules Committee, by a vote of 8-7, agreed on May 15 to recommend a rule to the House. The rule was the subject of heated debate on June 11, resulting in its rejection by the aforementioned 211-204 vote. While admitting that this vote had ended action on the measure in 1974, Representative Udall soon thereafter introduced a "clean bill" incorporating some 21 amendments he had intended to offer on the House floor, and promised to bring the bill to an early vote in the 94th Congress.

The rationale for the Land Use Planning Act was that "the present State and local institutional arrangements for planning and regulating land use of more than local impact often are inadequate ...

The unhappy results of this inadequacy were summarized in 11 additional paragraphs.

Following this list of calamities is a sweeping declaration of Congressional policy:

Sec. 102. The Congress declares that it is the policy of the Federal Government, in cooperation with the several States and their political subdivisions and other concerned public and private organizations, to use all practicable means to—

(a) assure that the lands in the Nation are used in ways that create and maintain conditions under which man and nature can exist in productive harmony and under which the environmental, social, economic, and other requirements of present and future generations of Americans can be met; and
(b) encourage and support the establishment by the States of effective land use planning and decision-making processes that assure informed consideration, in advance, of the environmental, social, and economic implications of major decisions as to use of the Nation's land and that provide for public education and involvement in such processes.

In support of the policy, the Secretary of the Interior was authorized to make grants to participating states totalling $800 million over a period of eight years. To qualify for a grant, a state would
be required to establish a land use planning agency and an intergovernmental advisory council.19 The agency was to initiate a "comprehensive land use planning process" which, despite a host of carefully chosen non-toxic verbs, constituted a statewide land use control program.20 To carry out this "process" and thereby qualify for the carrot of federal aid, States were required to use either direct State land use planning and regulation, or local government action approved by the State, or both.21

The State was also required to regulate areas it designated as "areas of critical environmental concern";22 areas "which are, or may be, impacted by key facilities";23 areas "presently or potentially subject to development and land use of regional benefit";24 etc. To continue to receive Federal funds after the first three years, the State would have to satisfy the Secretary of the Interior that it had not excluded any "areas of critical environmental concern which the Secretary had determined to be of more than statewide significance."25

Since these "areas of critical environmental concern" invited instruction from the Secretary of the Interior, the definition became particularly important. To begin with, such areas were defined to be "fragile or historic lands",26 "natural hazard lands",27 and "renewable resource lands".28 Then, to catch whatever had eluded the contemplation of the draftsman, the definition concluded with a fourth category:29 "(4) such additional lands as are determined to be of critical environmental concern."

A bill of such sweeping scope and importance naturally inspired strong opposition. Besides the relatively minor disputes involving technical language and administrative procedures, the main problems with the bill were two. First, the bill would for the first time inject the Federal government into the implementation of land use planning decisions, heretofore virtually the exclusive province of state and local governments.30 Second, the bill would ensure the creation of new institutions of government at the state level, strongly influenced by Washington, whose success could be assured only if they moved to seize complete control over the use and exchange of land.

Nevertheless, backers of the bill went to absurd lengths to disavow any intention of imposing Federal land use controls. Senator Henry Jackson, chief personage behind passage of the Senate version of LUPA, declared that "the Land Use Policy and Planning Assistance Act is the Nation's last chance to preserve and to invigorate local land use decisionmaking and to insure that basic property rights are not infringed by bureaucrats in places as far removed as
Washington, D.C."31 Yet, despite this impassioned if not wholly accurate rhetoric, the bill clearly included Federal controls. Perhaps the most explicit example was the requirement that to continue to receive Federal funds after the first three years, a state had to regulate “areas of critical environmental concern of more than statewide significance”, such areas to be designated by the Secretary of the Interior.32 But even if such explicit provisions for Federal control were deleted (and this one was deleted in Representative Udall's subsequent bill33), anyone experienced in the workings of Federal-state grant programs could not fail to recognize that the Washington officials who control the purse strings call the tune. The state officials administering the “process” would necessarily be highly receptive to “suggestions” emanating from the Interior Department, which also supplied the funds for their salaries.

This “institution first, directives later” approach was specifically endorsed in 1973 by William Reilly, then Executive Director of the Laurence Rockefeller-financed Task Force on Land Use and Urban Growth. Labelling the incorporation of substantive Federal directives into the legislation at the beginning as a tactical mistake, Reilly said:

The essential objective in the field of land use is institutional reform . . . Once states have established land use planning and regulatory processes along the lines likely to be required by the Federal law, it may be more appropriate to consider specific substantive directives aimed at preventing irresistible destruction of environmental values.34

Another strong advocate of the national legislation, Catholic University Law Professor G. Graham Waite, noting the advantages of a Federal bill that invited the states to undertake land use regulation on their own, observed:

It reduces expansion of the Federal Bureaucracy. It preserves the appearance of state power in the planning field and thus may reduce political opposition to national land use planning.35 (emphasis added)

Reassurances from LUPA’s proponents that no Federal control of land use decisions would ultimately transpire under LUPA were also far from convincing in view of the ardent espousal by the same persons of “crossover sanctions,”36 a system of severe economic penalization of States for failure to comply with LUPA. Under any Federal-State grant program, failure by the state to comply with Federal rules and regulations necessarily results in termination of the Federal assistance for that particular program. In addition, no State is required to take part in a Federal-State grant program—it is the state’s voluntary choice whether to participate or not.
By contrast, the “crossover sanctions” in the national land use bill’s provision went considerably further. If, after three years from the date of enactment, states had not chosen to participate in the program, i.e., had refused the Federal carrot, they would be treated to the Federal stick: a loss of funds to which the states were entitled under three completely separate programs—the Airport and Airway Development Act, Federal-aid highway assistance, and Land and Water Conservation Fund payments. Though this unprecedented provision was defeated on the Senate floor and deleted by the House Environment Subcommittee during markup of the House bill, it gave clear notice to all that the intent of the backers of the act was to eventually use every possible lever to force the States to undertake the “comprehensive land use planning process”. Opponents of the act could hardly be blamed for suspecting that these same backers had quite a few more ideas of the same nature in mind.

The second major objection to LUPA dealt with the creation of new institutions in state government, spawned and nursed by Federal money, which could achieve their lofty purposes (if at all) only by seizing more and more control over the property rights of individual citizens. As Representative Steve Symms (R-Idaho) put it:

This innocent sounding bill will necessarily create, throughout all these fifty states, well funded, well-staffed agencies of the government. These agencies, to succeed in their mission, must centralize power over property in their own hands. Each of these agencies will have a guiding testament—a statement of objectives reciting the lofty aims of society. Each of these agencies will necessarily be staffed by planners, experts, and lawyers entrusted with the achievement of these lofty objectives. They will be lavishly fueled with the taxpayer’s money. They will have their own expert ideas of how society can be changed to make those objectives a reality . . . . [T]he state land use agencies created and fattened under this legislation can succeed only by invading the legitimate rights of private property owners . . . .

This system would inevitably lead to a “New Feudalism” where the freehold theory of property ownership would be transformed into a “social property” theory. The State—in the last analysis, the Federal Government—would accede to the rights of the medieval king. Land would no longer be “owned” by private citizens but merely “held” for a superior.

The “free and common socage” so laboriously extracted from feudal tenures centuries ago would give way to a modernized tenure: all use and hence all exchange of land would be allowed by the State only when the use or exchange did not injure the public interest, as
determined by officials employed by the State.

Most backers of the freehold theory do not, incidentally, subscribe to Blackstone's famous dictum that:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.44

Freehold property theory includes ancient limitations. One may not waste and destroy his property; one may not use his property so as to injure that of another; one has no right to enjoy services provided by the public on his own terms. But, with these not insignificant limitations, a wide distribution of freehold property was considered indispensable to the creation of a free republic by the Founding Fathers.45 It was transparently plain to such men as John Adams,46 Thomas Jefferson,47 James Madison,48 and Daniel Webster49 that the radical idea of liberty and republican self government rested upon a premise of widespread private property ownership under the personal and responsible control of a multitude of owners. If the State were to confiscate the right to use and the right to exchange, the owner would have little left but the power to exclude. The power to undertake any economic activity requiring land would be vested in the State, as in the present day Communist countries.50

Would creation of a "comprehensive land use planning process" in a state lead to such a result? To determine that question, it is instructive to examine the experience in Vermont, a state whose environmental control law has been hailed by land use control advocates as a progressive model for the nation.

II. THE VERMONT EXPERIENCE

Throughout the decade of the Sixties Vermont became a haven for urban expatriates, second home buyers, tourists and skiers from Boston and New York City, who, with the aid of newly constructed interstate highways, were only a short drive away. Vermont's real estate and construction market naturally responded to this influx of new people with money to spend. Vacation home developments sprang up like mushrooms, some of them hardly more substantial.

Southern Vermont, closest to the urban population centers, experienced the building boom first. Plans for large new vacation home developments were announced almost daily. Alarmed by sensational newspaper accounts, Governor Deane C. Davis launched an investigation. It revealed numerous homes of shoddy construction,
with defective sewage systems, accessible only by steep, winding, thinly-gravelled roads unlikely to survive a Vermont winter. Though local towns in Vermont had plenty of legal authority to deal with the sewage and road problems, these problems were unfamiliar and the town officials unsophisticated.

Instead of mapping out a program to equip local towns and local citizen groups with the tools to deal with these problems, all of which were highly amenable to locally-designed solutions within the freehold property context, Governor Davis appointed a commission under then Representative Arthur Gibb to produce a state land use control program.

The outcome of the work of the Governor’s Commission on Environmental Control (a pregnant title, as it turned out) was H. 417 of 1970. This bill, passed by large majorities in both House and Senate, became Act 250.

The act had three major stages for implementation. First was the creation of a nine member State Environmental Board, and three-member District Environmental Commissions, to administer a system of development permits. Generally, a permit was required for any "development" consisting of more than ten units of housing; industrial development on more than ten acres of land (one acre in unzoned towns); and any development above the 2500 foot altitude.

To obtain a permit, a developer had to prove to the District Environmental Commission (and to the Environmental Board, on appeal) that his project: would not result in undue water or air pollution; had sufficient water available; would not cause unreasonable soil erosion, highway congestion, or municipal service and educational burden; would not have an undue adverse effect on scenic or natural beauty, aesthetics, historic sites, or rare and irreplaceable natural areas; conformed to all local or regional plans; and conformed to any subsequently adopted land capability or land use plan.

The second part of the "comprehensive land use planning process" was the preparation of a "land capability and development plan", defined in one inclusive and breathtaking sentence as:

a capability and development plan consistent with the interim land capability plan which shall be made with the general purpose of guiding and accomplishing a coordinated, efficient and economic development of the state, which will, in accordance with present and future needs and resources, best promote the health, safety, order, convenience, prosperity and welfare of the inhabitants, as well as efficiency and economy in the process of development, including but not limited to, such distribu-
tation of population and of the uses of the land for urbanization, trade, industry, habitation, recreation, agriculture, forestry and other uses as will tend to create conditions favorable to transportation, health, safety, civic activities and educational and cultural opportunities, reduce the wastes of financial and human resources which result from either excessive congestion or excessive scattering of population and tend toward an efficient and economic utilization of drainage, sanitary and other facilities and resources and the conservation and production of the supply of food, water and minerals. 56

Following this monumental achievement was to be the land use plan:

based on the capability and development plan which shall consist of a map and statements of present and prospective land uses based on the capability and development plan, which determine in broad categories the proper use of the lands in the state whether for forestry, recreation, agriculture or urban purposes, the plans to be further implemented at the local level by authorized land use control such as subdivision regulations and zoning. 57

It was this "land use plan" that threatened to be the undoing of the whole Vermont scheme for land use controls.

The implementation of the development permit process began in 1970. From the beginning, not surprisingly, it suffered from considerable confusion, delays, and irrationalities as untrained laymen on the district environmental commissions struggled to cope with applications exceeding their technical grasp. The commissions had little or no guidelines to follow other than the bare bones of the law itself—no administrative precedents or case law, and very little technical assistance. In addition, the Health Department Subdivision Regulations, adopted as a so-called "emergency" measure in the fall of 1969 and ratified ex post facto by the 1970 legislature, overlapped the field and caused additional confusion. 58 Other state laws regulating public buildings and water and air pollution, plus town zoning and building codes, aggravated the situation. Though Act 250 applied only to the so-called "larger developments", frustration and occasionally outrage began to percolate through the body politic.

Following the 1972 elections, in which Act 250 and its administration had not yet become a major issue, the Environmental Board made public its drafts for the "capability and development plan" and the "land use plan", which were intended for legislative approval in 1973. Environmental organizations were dismayed at the quality of the work, and apprehensive at the expected reaction. In this, they were not wrong.
The plans were exposed to public hearings, as required by the law, in the waning months of 1972, and were generally shelled from all directions. The land use plan was immediately withdrawn when neither outgoing Governor Davis nor his successor, Governor Thomas P. Salmon, would sign it for transmittal to the legislature. The capability and development plan, in a baffling series of versions, worked its tortuous route through the General Assembly to pass on the final day of the session. The result, however, bore little resemblance either to the description in the law or to the hopes of the environmentalists. Far from being the plan described in the statute, the “plan” was only a series of “principles”, followed by a number of clarifying amendments to the permit criteria of Act 250.

Meanwhile, the Board was hard at work on its land use plan which, as it turned out, was statewide zoning pure and simple. In this the Board faced a serious problem. The original act had defined “development” in a way as to exclude up to nine units of housing at one location, and subdivisions of less than ten lots. Clearly, if there was to be a serious comprehensive plan to achieve all the goals cited in the lofty language of the act, it would not do to have free individuals constructing nine unit—or even one unit—developments anywhere that local zoning allowed. The thought of even this much unfettered landowner discretion was more than any self-respecting planner could bear.

So in October, 1972, the Environmental Board adopted a resolution asking the legislature to lower the definition of “development” to include even one housing unit and even the surveying of lot lines on one lot! This proposition met a chilly response in the 1973 legislature. Instead of broadening the definition of “development”, the legislature inserted, in the definition of “land use plan” quoted above, this additional sentence:

The land use plan shall not be construed to govern the construction of improvements or the subdivision of land unless such activities fall within the definition of ‘development’ and ‘subdivision’ under section 6001 of this chapter.

This new language threw the Environmental Board into dismay, even as they celebrated the narrow passage of the much transformed “capability and development plan”. Charged with preparing a statewide zoning plan, they realized that no sound statewide zoning plan would make sense if any individual could build nine houses anywhere he chose, local zoning permitting.

The Board, after considerable discussion, arrived at the conclusion that the law must be either ignored or overridden, since the
The legislature had refused to change it. The Board's plan therefore included a new category of "subdivision and development", namely, "any subdivision or development, not now defined in section 6001 of Title 10" (emphasis supplied). Thus, notwithstanding the explicit legislative prohibition against making the land use plan applicable to "small developments", the Environmental Board moved once again to seize control, one way or another, over every single lot in the state.

The Board's response to another provision of the law governing the preparation of the land use plan is also instructive. The law required that the land use plan "shall consist of a map" which shall "determine in broad categories the proper use of the lands in the state..." The opposition that appeared upon unveiling the Board's first, broad-brush map in November, 1972 had made the Board wary. In open session, the Board debated the wisdom of complying with the law in this regard, as the 1973 unveiling approached. The Board decided, finally, to present a text without a map, notwithstanding the explicit requirement of the law that the plan "shall consist of a map". Two Orange County farmers, and later several town planning commissions, brought civil suits against the Board, seeking mandamus directing the Board to comply with the map requirement. The notoriety produced by the Board's refusal to produce the required map, accentuated by the filing of the law suits, caused legislative leaders to insist on the map to accompany the text of the plan. Then, in great haste, the Board asked the State Planning Office to prepare comprehensive state zoning maps within four weeks, a truly herculean task. When the maps finally appeared, in mid-February, 1974, the full import of the land use scheme sank home, and at a stormy public hearing on February 26, the plan was trampled to death. The legislature subsequently created a land use study commission to pursue the matter, and implicitly stripped the Environmental Board of any further responsibility for developing a land use plan for the State.

The foregoing is not intended to be an authoritative or exhaustive study of Vermont's Act 250 in operation. It is narrated merely to illustrate the basic point urged by those apprehensive about the effect of the national land use planning bills. The Vermont experience suggests that a well financed bureaucracy of experts and planners, given a sweeping mandate to produce coordinated, efficient and economic development, safety, order, convenience, prosperity, welfare, etc., must inevitably attempt to seize control over those activities falling beyond their legal mandate by whatever legal handle may be available, or by disregard of the law if necessary. The
Vermont experience demonstrates that the danger prophesied by opponents to the land use planning bills is far from fanciful.

III. ALTERNATIVE TECHNIQUES FOR GUIDING LAND USE

It is conceivable, at least arguably, that the land use institutions established under a Federal-aid program would move in a direction other than invasion of property rights through the imposition of land use controls. It is not possible, however, under the Land Use Planning Act considered by the House. That act and its legislative history are replete with direct instructions to the States. Those instructions demand control and regulation by the State, if the State is to continue to qualify for Federal funds under the act. For instance, in implementing the "planning process" (i.e., control program) in "areas of critical environmental concern", the States are required to "control the use of land" around "key facilities", control proposed large scale development", and "consider the environmental, economic and social impact of large scale subdivision or development projects". (Inasmuch as the original bill used the term "regulate" in place of the euphemism "consider" in this last paragraph, the intent of the sponsors is perfectly clear.)

The bill did include a section noting that "nothing in this title shall be deemed to prevent a state land use planning agency from adopting a land use control plan [n.b.] that uses methods other than zoning. . . .", but it does not allow land use guidance plans that use methods other than control. As for property rights, the bill includes only a meaningless observation that "nothing in the act shall be deemed to enhance or diminish the rights of owners of property as provided by the Constitution of the United States"—as if Constitutional rights might be removed by statutory action.

Are there alternatives to the program of state controls over private property that would almost inevitably flow from implementation of the Land Use Planning Act by the States? The reader who escapes the clutches of the state control and social property advocates can, with but modest effort, uncover a host of creative alternatives to uncompensated direct state land use controls over private property. It should not be presumed that these techniques are laissez-faire in nature on an absolute scale. They are not. All free market activity must, in any but a theoretical society, operate in some context which includes the law of property, eminent domain, taxation, and governmental activity of many kinds. Insofar as these activities impinge on the theoretical free market system, they are coercive. But the techniques to be discussed here avoid, in every case, the use
of the coercive power of the state to confiscate the property rights of landowners pursuing innocent enjoyment of their property, without at the very least requiring the general public to give something of value to the landowner for his coerced cooperation—something of economic value, in addition to whatever warm rosy glow may result from his giving up his rights in land for the benefit of the public. The discussion is decidedly heuristic; readers must consult the references cited for a more detailed treatment in each case.

A. Individual Action Techniques

In a densely populated society some land use conflicts are inevitable. In recent years there has been a strong movement to deal with the increasing number and severity of such conflicts through the imposition of public controls, most notably planning and zoning. This movement has been based on the philosophy that it is inconvenient, inefficient, and even undesirable for individuals and groups of individuals to attempt to deal with land use conflicts on their own; the decision making and regulation should be imposed collectively by the government. Satisfaction with the results of increased planning and zoning has, however, become almost as rare as a Black Panther at a Klan meeting. The search for new and decentralized techniques has thus begun.

Professor Joseph Sax of the University of Michigan Law School has been prominent in expanding the field of legal action to protect against environmental offenses. Disenchanted with the inefficiency and impenetrability of public regulatory processes designed to protect the environment, Sax developed "a strategy for citizen action" based on direct citizen litigation. The key sentence in Sax's model legislation, which has been enacted in the State of Michigan, is:

Sec. 2.1 The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

The Sax approach imposes upon the court the responsibility of identifying or devising some standard of performance to guide a
determination in each case. Where performance standards exist in legislation, this may not be a difficult task, but in many cases the judge will be forced to break a path through the wilderness. In addition, by allowing any person to bring the action, the Sax bill opens the door to professional public trust protectors whose abstract concern for the environment may give little weight to the concerns of local communities and the wishes of their people. For example, the Sierra Club might well wish to bring an action to stop discharge of paper mill wastes into a remote lake, with no concern for the economic well-being of the people in the community who would necessarily balance a clean environment against the threat of massive unemployment.77

Professor Allison Dunham of the University of Chicago Law School sees considerable potential in enforcement of planning decisions by reducing marketability of a landowner's product through "(A) threatening the income forthcoming from the property; (B) making it difficult to adhere to established management and marketing practices; and (C) rendering the title defective so that buyers and lenders will not or cannot purchase an interest in his commodity."78 For example, a tenant can be relieved from paying rent if the landlord's certificate of occupancy is revoked for housing code or other violations. Violations can be made to trigger clauses in insurance policies and mortgages producing unpleasant results for the violator. Recodnation of subdivision plans can be denied, forcing a land developer to describe his lots in the inconvenient metes and bounds manner, which is not appreciated by real estate marketing and financial institutions. Most important, Dunham envisions title encumbrances flowing from ordinance violations, such as a senior lien imposed by a city government for improvements made by the city on private property.79

Dunham's proposal operates within the context of collective zoning and ordinances. Yet the techniques discussed could as easily be applied to a decentralized, "privatized" system. Dunham also anticipates Sax's proposal for direct action by individuals to enforce planning decisions against non-complying neighbors, and actions seeking mandamus against public officials who have ignored enforcement of such ordinances.

A comprehensive and conceptually sound approach to a decentralized, privatized system has now been offered in a masterful article by Professor Robert C. Ellickson of the University of Southern Calkornia Law School.80 His one hundred page article entitled "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls" lays the groundwork for a reform of the legal
system to permit individuals to resolve land use disputes in accordance with clear and workable principles.

Ellickson discusses the economic concepts underlying land use conflicts. He points out that an economic solution to such conflicts should minimize the sum of nuisance costs, prevention costs, and administrative costs. Upon analysis, Ellickson finds very little to recommend currently practiced zoning programs. "In the United States," he says, "zoning generally works to the detriment of the poor and near poor, racial minorities and renters; it operates for the benefit of the well-to-do, particularly homeowners, by artificially increasing the supply of sites on the market usable for only expensive homes and thus reducing their cost."81

Ellickson then offers a reformulation of nuisance law to place the risk of loss from external harms on the landowner carrying out the damaging activity. Once a plaintiff establishes a prima facie case of nuisance involving substantial harm to him—when an activity is deemed "unneighborly" by contemporary community standards—he will seek judicial relief. The court may decide under one of four rules:

1. Injunctive relief;
2. Damages to plaintiff, but no injunctive relief;
3. Neither damages nor injunctive relief (judgment for defendant);
4. Injunctive relief, with compensation to the defendant.

Where injuries are pervasive but individually insubstantial, and where a reasonably stable objective index of noxiousness exists,82 a public body would assess fines to internalize the costs to the public generally.83 Where such an index does not exist, mandatory standards would be applied. The collective aspect of the system would be implemented through Nuisance Boards combining rule making, administrative and adjudicatory functions within the guidelines of state law.

The foregoing brief discussion does little justice to the breadth and depth of Ellickson's proposal. It would clearly take a very determined and farsighted effort by bar associations and other organizations to install Ellickson's nuisance system in state law. That effort will probably not come until it becomes apparent even to the casual observer that the current trend toward more and higher level zoning is totally misdirected and, in fact, destructive of many of the ends it seeks.

In connection with Ellickson's approach, the use of mediation and arbitration to cope with environmental and land use disputes is still in its infancy.84 The Center for Dispute Settlement of the American
Arbitration Association has recently begun to participate in a growing number of mediation and arbitration cases involving such disputes.\textsuperscript{85} Development of model arbitration rules in various kinds of disputes—something that could easily be based upon the Ellickson proposal—would be a useful advance in this direction.

B. 

**Mutual Defense**

Covenants have long been used as a private voluntary means of land use control. This is essentially a private zoning plan voluntarily agreed to by all affected landowners. It is most commonly established by a subdivision developer prior to selling lots on the market, since he has complete ownership of all parcels at that point. It can, however, be established among numerous individually owned parcels, although the transaction costs are much higher and unanimity is usually required if the plan is to be effective.

Bernard Siegan has authoritatively described the workings of a covenant system in the nation’s largest unzoned city, Houston, Texas.\textsuperscript{86} After a detailed and exhaustive study of real estate patterns in Houston and comparison with similar cities which have zoning (e.g., Dallas), Siegan can find absolutely nothing favorable to say about municipal zoning. Through a covenant approach, buttressed with some general performance ordinances to govern nuisances, Siegan believes free market forces would do a far better job of shaping land use than the inevitably political activity of centralized land controls.

Building upon Siegan’s definitive work, lawyers at the University of Southern California Law School have developed an institutionalized covenant system which has the effect of shifting to the public the costs of creating and enforcing a private covenant system.\textsuperscript{87} Thus, for example, whenever a land owner undertook a land use which violated the covenant governing his land, any affected person could bring a quick, effective action for restraint of the offender. The system, in effect, rationalizes what grew up almost accidentally in Houston, and provides public mechanisms for efficient citizen enforcement.

Finally, petition zoning should at least be mentioned, although it does represent coercion of a minority of landowners by the majority.\textsuperscript{88} Under petition zoning, landowners owning (say) two thirds of the assessed valuation of property in a self-defined district may petition local government to exercise its police power to impose a very simplified, highly localized zoning plan in their neighborhood. This is not, strictly speaking, within the purview of this article since
it does involve direct coercion of dissenting landowners. In its decentralized and simplified nature, however, it is probably preferable to zoning schemes determined and enforced by distant governments and their bureaucrats.

C. Compensated Regulation

Where Ellickson suggests an injunction with compensation to the person enjoined as a promising avenue of land use guidance, Chicago attorney Fred Bosselmann has offered much the same idea with regard to public regulation. Under his plan, instead of the state either taking property under eminent domain with compensation, or posing restrictions on privately held property which may virtually destroy its value, the state would impose regulation and pay the landowner for the value of his land extinguished by the regulation.

Legally speaking, the state would pay damages for reducing the value of land beyond a certain point. The state would not have to take the property, as in eminent domain, but it would periodically compensate the landowner who is forced to forego certain activities in the public interest. This device avoids the present dilemma of zoning cases, where an either-or situation obtained: either the ordinance is upheld, and the plaintiff forced to absorb the loss; or the ordinance is declared to be invalid as regards plaintiff's property, and he is free to embark on his desired use, the public interest notwithstanding. While Bosselmann's plan is coercive in forcing a landowner to do certain things against his will, the plan at least recognizes the justice of payment by the state for what it takes in the name of the public.

A far more detailed proposal along the same lines has been offered by University of Pennsylvania Law Professors Jan Z. Krasnowiecki and James C. N. Paul. Under their plan, the land in question is first valued as in an eminent domain proceeding. The state or local government guarantees this value to the landowner. Then zoning-type regulations are applied to guide the future use of the land.

If these use regulations prohibit an existing use, the owner may draw upon his guarantee for damages. If they prohibit a possible future development use, the owner may ask for a government-supervised sale of his property. If the proceeds of the sale are less than the guaranteed value, the government makes up the difference. The guaranteed value includes an escalation clause to account for inflation in the value of the dollar (but not inflation of local real estate prices).
The owner thus receives a guarantee of his parcel’s value as of the date the restrictions were first imposed. The guarantee lasts as long as the controls continue. It is protection against loss of value due both to regulation and to a possible depression in real estate prices.

D. Public Acquisition of Rights

Public ownership has long been a feature of American life, from the days of the Puritans onward. There are few who would argue that the public has no business acquiring certain interests in real estate, although a lively debate exists about how far public ownership should be extended. In our time, William H. Whyte has been a most influential voice for the public acquisition of easements or interests less than fee simple to preserve natural scenery and resources. In acquiring easements, of course, the state must either make an offer acceptable to the landowner, or initiate eminent domain involving compensation and, usually, a jury trial on its amount. Various tax benefits—such as deductibility of the easement value as a charitable contribution to the governmental body—add incentive to landowners to donate easements or make a donative sale at a reduced price. The Nature Conservancy, a private organization, has developed donation techniques to a fine point.

An interesting example of public acquisition has occurred in the small town of St. George, Vermont. There, the voters voted in town meeting to buy a choice 48-acre parcel at the town’s only crossroads. A local bank advanced the funds on a short term note based only on the town’s promise to repay. The town then sponsored an architectural contest to design the most suitable town center to occupy the property, in which nine architectural firms participated. Armed with a winning concept, the town is now prepared to deal with any developer who wishes to undertake the venture, possibly even as a joint venturer with the town itself. In a move of doubtful legality, the town also zoned adjacent parcels noncommercial, to create for the town government a monopoly in commercial land. To date the town has not been deemed ripe for construction of the town center, but the existence of Interstate 89 just four miles away, and the expansion of the Burlington metropolitan area to within eight miles of the town, indicate that St. George will be developed within the decade. A similar program is reportedly underway in the coastal village of Georgetown, Maine. In Georgetown’s 1972 town meeting, the voters overwhelmingly rejected town zoning—but agreed to permit the town to buy up fifty of the town’s waterfront acres for future development.
The idea of the community land trust also deserves attention. It has been defined as "a legal entity, a quasi-public body, chartered to hold land in stewardship for all mankind present and future while protecting the legitimate use rights of its residents."96 While at first glance that definition appears to embody the "social property" concept which won such poor reviews earlier in this article, it must be noted that the community land trust is necessarily based on voluntary acquisition of land from private freehold owners. Indeed, one of the privileges of freehold ownership is to establish a trust over land for the benefit of named and unnamed beneficiaries. One does not have to embrace Ralph Borsodi's concept of "trusterty" as an alternative to "property" to accept the community land trust as a useful non-coercive technique for guiding land use.97

Under a typical land trust, the trust agreement spells out in general terms the allowable uses of the land, and charges the trustees with administration. The trust-owned land is customarily leased to tenants (frequently homesteaders in rural areas) on a long term basis, subject to certain restrictions on use and an obligation to pay a stated amount to cover property taxes and other essential costs. A land trust can as easily be created to allow commercial and industrial uses.98

The concept of the land trust can be applied to public bodies as well as those created by private individuals.99 A public land trust would acquire land and rights in land through open market purchase or lease or possibly through eminent domain. It would in turn lease such land back to those performing appropriate activities on it, commonly farming. By removing the possibility of development, the value of the land would be lowered and the property tax burden would be reduced on the tenant. The trust could also lease the development rights from, say, an operating farmer. During the period of the lease, the farmer would pay local property taxes only on the value of the land for agricultural purposes, while the trust would pay to the local government the taxes on the trust-held development rights. If the farmer wished to re-acquire the development rights at some later time, he would be required either to pay a roll-back price equivalent to the cumulative value of the tax benefits enjoyed, or to share any appreciation in the value of the development rights with the trust.100

Land trusts are in operation in Prince Edward Island101 and Saskatchewan,102 Canada, and one has been proposed by the North Dakota Farmers Union.103 The legislature of Suffolk County, Long Island, New York has appropriated $45 million in its 1974-76 capital
program to enable it to acquire interests in 9,000 acres of farmland threatened by urban development.\textsuperscript{104}

One further example of public acquisition of rights—in this case an unwilling acquisition—should be noted. The imposition of land use controls necessarily diminishes the value of private land by restricting its use, and hence its exchange potential. Current case law gives little clear guidance in takings cases, inasmuch as every case is arguably distinguishable, and a host of precedents can be construed to support the positions of both parties to the action.

To clarify this situation, the author has proposed a very simple inverse condemnation statute:

 Whenever implementation of a state or local land use planning and regulatory program restricts the use or exchange value of land so as to reduce its fair market value to less than fifty percent of its unrestricted fair market value, the owner of such land shall have the right to invoke condemnation by the government imposing the restrictions, or to receive appropriate compensation from that government, and in either case to have compensation determined, at his request, by a jury.\textsuperscript{105}

While this proposal is not in itself a technique for guiding land use, it can be categorized under the heading of public acquisition of rights inasmuch as it would force the public to acquire certain rights whenever regulation severely reduced the value of land to its owner. It is, in a sense, the companion to Bosselmann’s compensated regulation plan. In practice, suspecting that its action would lead to an inverse condemnation action by the landowner involved, the government would actually take the property under a simplified eminent domain procedure, attach such covenants as it deemed to be in the public interest, auction the restricted parcel to private buyers, afford the initial landowner the right of first refusal at the auction price, and absorb the difference between the acquisition price and the auction price as the market-determined cost of the regulation to the public.

E. Transferable Development Rights (TDRs)

The idea of development rights that may be transferred from a parcel in an area where development cannot be accommodated or should not be allowed, to a parcel elsewhere where development is not objectionable, has received a sudden wave of attention. Like zoning, TDR plans require very careful planning by the governmental body. But unlike zoning, TDR plans do not merely extinguish value in some parcels and create it in others; they effect a transfer of development rights from the “losers” to the “winners” at the
expense of the winners.\textsuperscript{166}

Legislation sponsored in Maryland by Senator William Goodman describes one of the numerous applications of the idea.\textsuperscript{167} Under it, the county governments would make essentially two decisions: (1) determining the total amount of development that can be accommodated, given the present and expected future public infrastructure; (2) publishing a schedule of relative weights of various types of development—houses, apartments, shopping centers, office buildings, etc.

Initially, TDR units would be apportioned to all undeveloped land in the county on a per acre basis. No ten acre parcel would have enough rights from the distribution to allow its owner to construct a ten acre shopping center. To obtain the requisite number of rights, the developer would seek out landowners in sparsely developed areas of the county and offer to purchase the TDR units attached to their parcel. When sufficient TDR units are accumulated, the shopping center may be built. At the same time, the landowners who sold their TDR units to the developer will no longer have the right to develop their property, but they will have been compensated by the developer for giving up their valuable right to develop.

The TDR system has several advantages over ordinary zoning. Because the government is not required to specify zones in which certain activities may be undertaken, there is no incentive for developers and landowners to corrupt the zoning process, i.e., finagle an upzoning to their benefit. The “windfall-wipeout” problem is eliminated; the “externalities loop” can be closed; and the public can recoup some of the values in land created by public actions.\textsuperscript{168} There is no extinguishing of land values by fiat as in zoning. One of the open questions debated by TDR advocates, however, is whether the governmental decisions should be limited to defining the overall capacity for development and the schedule of rights required, or whether the TDR scheme should be employed in conjunction with a more conventional zoning ordinance.

A rural version of a TDR scheme has been adopted in Southampton, Long Island, New York.\textsuperscript{169} There, a farm owner is allowed to concentrate all the development rights of his land onto a small segment of it. The farmer can then arrange to develop this small segment at high density, or transfer the rights to others. The farmland from which the TDRs were taken is, of course, then taxed at use value for farming only. The farmer is compensated for his loss of development rights on the farmland by the increased value of the portion of land on which the TDRs are concentrated.
F. Taxation Devices

Taxation has long been recognized as an important influence in shaping economic decisions. Perhaps the most famous apostle of harnessing tax policy to land use and development was Henry George. In his enormously influential work Progress and Poverty, published in 1879, George advocated the abolition of all taxes save that upon land values; i.e., to appropriate rent by taxation. The result, he was convinced, would be that the single tax on land would either force owners to improve it, or sell it to others who would. This would, in George's view, stimulate a great productive boom by making it impossible for landowners to hold their land out of production.

Henry George's plan has never enjoyed widespread acceptance or application in the United States. Nonetheless it suggests a means for encouraging concentrated development in some areas and no development in others, one of the goals commonly sought by police power controls over land use. Assuming state constitutions permitted the differential taxation, a plan could be devised which placed heavy taxes on land in urban centers, but very little or none on improvements. In rural and natural resource areas, the reverse would be true: there would be very heavy taxation of other than agricultural improvements, and very low taxation on land itself. In between there could be intermediate zones with differing proportions.

There is little doubt that such a scheme would have a drastic effect on land use in a very short time. Indeed, for the first year or two it would certainly be a real estate broker's dream. The most serious drawback is probably that of completely altering the expectations of millions of private landowners by switching over to the new system. Once transitional problems were accommodated, however, the scheme along these lines might have most interesting consequences.

Professor Gordon MacDonald of Dartmouth College, an original appointee to the Council on Environmental Quality, has developed a plan for a system of user charges, in effect taxes, to discourage land uses thought by the public to be harmful. The tax would be based on the difference between the use priority established by the government and the actual use. "If an industry wishes to locate on a wetland, it should be allowed to do so, provided that it is charged to an extent commensurate to the total cost to society of that use—on an annual basis, the cost to fisheries, wildlife, recreation, and so on. . . . Unlike the property tax, the user charge would not be a means of raising revenue but rather a way of employing the
market mechanism to influence land use decisions." Interestingly, Professor MacDonald told the Senate Interior Affairs Committee in 1973 that he had reversed his earlier support of Senator Jackson’s land use bill as a result of his study of the workings of nearby Vermont’s environmental control laws.

MacDonald’s plan as presented contains a full complement of zoning and coercion by the state, although it backs off from the idea that the state should assume all power over the use and exchange of land. There would appear to be no reason why MacDonald’s ideas could not be adapted to a setting more congenial to free market thinkers like Siegan and Ellickson.

G. Public Investment Controls

Public investment decisions have the dual virtue of having an enormous effect on private development decisions, and avoiding a coercive effect on private property. In a society which has generally socialized highways, water and sewer systems, police and fire protection, and education, and which has virtually socialized electric power generation, transmission and distribution, and air and rail transport through rigid regulation, existing control by the public over these activities offers a shining opportunity for shaping growth decisions. Indeed, one of the most avid state land use controllers in Vermont, the Cabinet-level Secretary of Environmental Conservation, observed in a relatively calm moment that the state could virtually control development with well-designed controls over public investment of state funds.

In November, 1973, the House Committee on Public Works opened a pioneering series of hearings on “A National Public Works Investment Policy: A Strategy for Balanced Population Growth and Economic Development.” While the difficulty in coordinating public investment policies at Federal, state, and local levels poses a major obstacle to efficiency, this approach to guiding development is both potent in its impact and beyond the criticism of those who regard freehold property as a necessary underpinning of individual liberty and a republican form of government.

IV. A Proper Federal Role

If a Federal-state program along the lines of the proposed Land Use Planning Act is found to be undesirable, what should be the role of the federal government in guiding land use planning and national growth? In the author’s view, the Federal Government could perform useful services in the following ways.
First, it could undertake detailed legal and economic research on the many questions posed by alternative techniques for guiding growth. Much of this it has already done, although not in a particularly well coordinated way. A coordinated research and dissemination program, perhaps along the lines of the National Science Foundation's "Research Applied to National Needs" (RANN) program, would be extremely desirable. Research is presently being conducted or sponsored by the National Science Foundation, Department of Agriculture, Department of Housing and Urban Development, Department of Transportation, Environmental Protection Agency, and Department of Interior, just to name a few from what is no doubt an imposing list. The products of this research program should be disseminated widely among state and local governments, regional planning commissions, professional associations, and the interested public through publications and conferences.

In doing so, however, it is important that the lead agency approach the subject in a true spirit of dispassionate analysis, rather than as a campaign of propagandizing for its own policies and organizing pressure directed toward the Congress. For example, the research program should devote considerable attention to analysis of the role of government in causing senseless and costly misallocations of land through misguided public policies and their implementation. In an age where government research ranges from the sweat of aborigines to ancient Polish social customs to the sex life of the cabbage, it is remarkable that so little attention has been given to the frequently maligned role of government itself in causing national problems. On second thought, however, perhaps it is not so remarkable.

Second, the Federal government should continue to underwrite costs and absorb risks in a number of selected experiments in guiding land use and growth. States are reluctant to invest in research and development in any area, and the proposal to embark on an innovative test program in land use controls might well evoke a less than enthusiastic response from the legislature. The $500,000 support by the Department of Housing and Urban Development for the "Rockingham Plan" developed by the Vermont Department of Budget and Management is an example of wise use of Federal funds. The results of these various experiments must, of course, be carefully analyzed and discussed with policy makers in other jurisdictions and the general public.

Third, the Federal government should continue to explore the potential of Federal public investment in shaping national growth
and development. As noted before, the Congress has already made a significant beginning. The Agriculture Act of 1970 required the President to report to Congress annually on the efforts of the executive branch to spur development in rural areas.\(^2\) The same act also requires the President to report to Congress on the location of new Federal offices and other facilities.\(^3\) The Housing and Urban Development Act of 1970 required the President to transmit to Congress a biennial report on national growth.\(^4\) These as yet uncoordinated efforts have nonetheless established a base for a Federal public investment policy.

Finally, if the Congress is determined to entice the states further into the land use field, Congress could adopt a special revenue-sharing measure. Unlike the Land Use Planning Act, such a bill would merely provide Federal funds for State and local activities designed to guide land use decisions.\(^5\) It would omit the exhaustive list of criteria and instructions of the Jackson and Udall bills, leaving the shape of the state and local program to be determined by the people of those jurisdictions through their own governmental processes. No doubt in many jurisdictions the result would be statewide land use controls. In some enlightened states, where shapers of public policy entertain a balanced and thoughtful respect for a host of social, political, historical, economic and environmental values instead of a consuming desire to enthrone the theory of social property triumphant, wise and intelligent policies might emerge to serve as an example to other states, a frequently hoped for but rarely achieved reversal of Gresham's mournful law.

---

**Footnotes**

*President, Institute for Liberty and Community, Concord, Vermont; Member of Vermont House of Representatives, 1969-1973.
2See, e.g., editorials in the NEW YORK TIMES and CHRISTIAN SCIENCE MONITOR, June 13, 1974, and WASHINGTON STAR NEWS, June 17, 1974.
3Even before the vote, the bill's sponsors were actively bewailing the sudden rise of opposition to it. On June 3, for example, Congressman Udall took the floor of the House to complain about "misrepresentations," "seeds of confusion," "malevolent misreadings," "mischievous allegations," "hysterical discussion of property rights," and "irresponsible and slanderous attack," attributed by him to the Chamber of Commerce of the United States. 119 CONG.
Rec. H-4656 (June 3, 1974). A week later, the principal Senate sponsor, Senator Henry Jackson of Washington, told the Senate that the bill "has been the target of an unprecedented campaign of misrepresentation and falsehood. In addition, it has become a principal pawn in what some have characterized as 'impeachment politics.'"

119 Cong. Rec. S-10156 (June 10, 1974).


Rules Committee actions are not published as such. Actions taken may be determined only by inquiring with the clerk of the committee. On this particular action, see, Environmental Report, National Journal at 368-370 (March 9, 1974).


See, remarks supra n. 12.

House floor debate is found at 119 Cong. Rec. H-5019-42 (June 11, 1974).


Id., §102.

Id., §408(a).

Id., §103.

Id., §104.
The Housing Act of 1954, P.L. 83-560, §701, has provided grants to the states for two decades for the purpose of comprehensive planning. Under this legislation, however, the Federal government has played no part with respect to implementation of the planning, leaving that entirely to the state and local governments.

The term apparently originated with Congressman Symms. See, however, the editorial in the PHOENIX GAZETTE of June 11, 1973 which contains the same analogy without the label: "In effect, property owners would be reduced to landless serfs beholden to the lord..."
of the manor in Washington. With Washington controlling use, titles to property would become worthless scraps of paper in a modern system of feudalism.”

43Cf., the views of one ardent and well-informed proponent of land use control, former Vermont Representative R. Marshall Witten: “I advocate nothing less than doing away with private ownership as it concerns real estate. We will have to change our legal philosophy to do that. We will have to stop thinking of land ownership and start thinking of land holdership.” Quoted in BOSTON GLOBE, April 16, 1973.

442 Blackstone, COMMENTARIES 1-2.


46Cf., his letter to James Sullivan of May 26, 1776.

47Cf., his letter to James Madison, October 28, 1785.


The land, its mineral wealth, waters, forests, mills, factories, mines, rail, water and air transport, banks, communications, large state-organized agricultural enterprises (state farms, machine and tractor stations, and the like), as well as municipal enterprises and the bulk of the dwelling houses in the cities and industrial localities, are state property, that is, belong to the whole people.

51Ironically, the Vermont legislature had just passed a thorough revision of the State’s municipal planning and zoning statute, which went into effect March 23, 1968. See, Act 334 of 1968, 24 V.S.A. Ch. 91. The new act, inter alia, authorized towns to impose stringent zoning and subdivision regulations, including such features as site plan approval, design control districts, performance standards, and
planned unit development regulations. See, 24 V.S.A. §4407. Towns are allowed to require a performance bond to cover the full cost of new streets and their maintenance for two years after completion. See, 24 V.S.A. §4416. Under Vermont law, towns may accept streets and roads dedicated to the town, but are under no obligation to do so. See, 24 V.S.A. §292. The 1968 legislation reemphasized this. See, 24 V.S.A. §4419. As for sewage disposal and health-related matters, local boards of health have long enjoyed wide powers to establish standards, enter to inspect, order compliance, impose penalties for non-compliance, and seek injunctions. See, 18 V.S.A. Ch. 11. Finally, the local legislative body has long been empowered to “prefer a bill in equity for relief by injunction for the abatement of public nuisances.” See, 24 V.S.A. Ch. 51, §2121. Even a casual perusal of these statutes reveals splendid avenues of obstruction at the disposal of local governments.

54Id., §6001(3).
55Id., §6086.
56Id., §6042.
57Id., §6043.
58Act 249 of 1970 ratified the administrative regulations of the Health Department, issued September 18, 1969.
59Interestingly, Governor Salmon, as a member of the House in 1970, had conducted what was described by an unfriendly reporter as a “mini-filibuster” against Act 250. The future Governor was at that time reported as being the counsel to several large Southern Vermont developers. Later he became an extremely vocal champion of strong land use controls. The unfriendly newsman became his secretary of Civil and Military Affairs.
60Act 85 of 1973. Commenting on the “plan” two months later, State Planner Arthur Ristau was quoted as saying, “the Land Capability and Development Plan is not a plan at all. All it does is tighten up the holes in the sieve.” Rutland Herald, June 6, 1973.
6110 V.S.A. §6043.
6310 V.S.A. §6043.
65The two law suits were eventually dismissed; the former for want of “ripeness”, the latter, long after the adjournment of the legislature, presumably for mootness.


Id. §105(e).

Id., §105(h).

H.R. 10294, 93d Cong., 1st Sess. §105(g).


§106(d)(3).


Vermont's Act 250 of 1970, in addition to establishing the environmental control program described above, also added a section to the existing tax statute requiring, prior to recordation of deed, a certificate by the seller that "the conveyance of the real property
and any development thereon by the seller is in compliance with or exempt from the provisions of this act.” 32 V.S.A. §3378. As Dunham would have expected, this requirement impedes transfers until environmental requirements have been met. See also, Burke, B., Jr., Governmental Intervention in the Conveyancing Process, 22 AMER. UNIV. L. REV. 239 (1973).


*Id., at 705.

As, for instance, the primary and secondary air pollution control standards established and monitored by the Federal Environmental Protection Agency.


*Bloch, R., and K. Wertz, supra n. 76, at 185-86.

*Personal communication, September, 1974.


*Note, Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative, 45 S. CAL. L. REV. 335 (1972).


*Whyte, W., THE LAST LANDSCAPE (especially Ch. 5) (Garden City: Doubleday, 1968).

*Internal Revenue Code of 1954, §170(b).


*Faux, G., The Hobo's Question, (unpublished address to the


99Cf., House Bill 467a, introduced by the author as a member of the Vermont House of Representatives in 1972. The description that follows is based on this bill, which, alas, was not acted upon.


103A LAND TRANSFER SYSTEM (pamphlet) (Jamestown, N. Dak.: North Dakota Farmers Union, 1974).


105First proposed in the VERMONT WATCHMAN, April, 1973. This tabloid on land use matters, published irregularly by the Landowners Steering Committee of Lyndonville, Vermont, has yet to receive the widespread acclaim it rightfully deserves. The author serves as its editor.


107Goodman, J., Problems and Solutions to Planning and Land Use, address to the Maryland State Senate, 1971; Senate Bill 254.

108Costonis, J., supra n. 105, at 99.


111It has, however, flourished in two small “single tax” enclaves: Fairhope, Alabama and Arden, Delaware. See, PROPERTY TAXATION:


Id.

Id., at 336.

BURLINGTON FREE PRESS, August 17, 1973.


See, e.g., the RANN publication, ENVIRONMENT: A NEW FOCUS FOR LAND USE PLANNING (Washington: National Science Foundation, 1973).

This intriguing program involves the categorization of land with differential taxation among the various categories. It also contains a bewildering variety of new tax concepts, and undergoes revision at least once each week. To date no clear, explanatory material has been made publicly available.

P.L. 91-524, Trr. IX.

Id. See, e.g., Report on the Location of New Federal Offices and Other Facilities (Presidential Message), 118 CONG. REC. S-14235 (September 14, 1971).


A reasonable facsimile is H.R. 13790, offered by Representatives Sam Steiger (R-Ariz.) and John Rhodes (R-Ariz.) in the 93d Cong., 2d Sess., as a substitute for the Udall Land Use Planning Act, H.R. 10294, 93d Cong., 1st Sess. (1973). Despite the lack of Federal controls, the Steiger-Rhodes bill would also have stimulated the creation of state-level land use control institutions, thus preserving one of the major points of concern to opponents of the Udall bill.